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In the Supreme Court of the United States

_____ TERM, 1973

NO. 73-251

JOHN JAMES MEILY, JR.,

Petitioner,

vs.

AGRICULTURAL INVESTMENT CORPORATION, S.A., a Panamanian company, and FIRST NATIONAL INVESTMENT CORPORATION, S.A., a Luxembourg company, and AGRI INTERNATIONAL, S.A., a Panamanian company,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, THIRD DISTRICT

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MIAMI REVIEW — 371-4853 — 377-3721

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in the
Supreme Court
of the
United States

_____ TERM, 1973

NO. _____

JOHN JAMES MEILY, JR.,

Petitioner,

vs.

AGRICULTURAL INVESTMENT CORPORATION, S.A., a Panamanian company, and FIRST NATIONAL INVESTMENT CORPORATION, S.A., a Luxembourg company, and AGRI INTERNATIONAL, S.A., a Panamanian company,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the District Court of Appeal, Third District, of the State of Florida, entered in the above case on January 25, 1972, petition for rehearing denied on March 8, 1972.

OPINIONS BELOW

The Order of the Circuit Court in and for Dade County, Florida, granting the Respondents' motion to dismiss on the theory of forum non conveniens is unreported and appears in Appendix A. The Order of the Circuit Court, denying Petitioner's motion for rehearing on the Order of dismissal is unreported and appears in Appendix B. The Order of the Circuit Court denying Petitioner's motion to vacate the Order of dismissal is unreported and appears in Appendix C. The Opinion of the Florida District Court of Appeals, Third District, affirming the foregoing orders of the Circuit Court, is reported at 258 So.2d 519 and appears in Appendix D. The Opinion of the Florida Supreme Court dismissing Petitioner's appeal for lack of jurisdiction is as yet unreported and appears in Appendix E. The opinion of the Florida Supreme Court discharging the Writ of Certiorari for lack of jurisdiction, with written dissent, is reported at 276 So.2d 161 and appears in Appendix F.

JURISDICTION

The judgment to be reviewed was made and entered by the Florida District Court of Appeal on January 25, 1972. An order denying a timely motion for rehearing was made and entered on March 8, 1972. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C.A. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provisions involved are the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

QUESTIONS PRESENTED FOR REVIEW

Whether a state may, consistent with due process of law required by the Fourteenth Amendment of the United States Constitution, dismiss a Complaint filed by a United States citizen against foreign (non-U.S.) corporations, based on the doctrine of forum non conveniens, when such dismissal has the effect of relegating the U.S. citizen to the courts of foreign countries.

Whether a state may, consistent with the requirements of the privileges and immunities clause of the Fourteenth Amendment of the United States Constitution, dismiss a Complaint filed by a United States citizen against foreign (non-U.S.) corporations, based on the doctrine of forum non conveniens, when such dismissal has the effect of relegating the U.S. citizen to the courts of foreign countries.

Whether a state may, consistent with the doctrine of forum non conveniens, dismiss a Complaint filed by a United States citizen against foreign (non-U.S.) corporations, based on the doctrine of forum non conveniens, when such dismissal has the effect of relegating the U.S. citizen to the courts of foreign countries.

STATEMENT

Petitioner, John J. Meily, is a United States citizen who has resided outside of the United States for several years prior to the occurrence of the events and transactions which are the subject matter of this cause and was so at the time the Complaint was filed.

Respondent AGRICULTURAL INVESTMENT CORPORATION, S.A. (hereinafter "AICSA") is incorporated under the laws of the Republic of Panama and is the sole manager of Agri-Fund. Respondent FIRST NATIONAL INVESTMENT CORPORATION, S.A. (hereinafter "FNICSA") is a Luxembourg company. Respondent AGRI INTERNATIONAL, S.A. is incorporated under the laws of Panama and is the successor to FNICSA. These entities are the component parts of what is essentially an "offshore" mutual fund. Their relationship and functions and described more fully in their published brochure which is a part of the Record.

On April 7, 1970, Meily and Respondents (AICSA and FNICSA) entered into a written employment contract. The contract was signed by Meily, Edward Walterman (for FNICSA) and Edward J. Marcus (for AICSA). By this agreement AICSA and FNICSA employed Meily in the capacity of Executive Vice President of FNICSA and as Director of AICSA for a term of three consecutive years from May 1, 1970. Under the terms of the employment contract Meily's primary responsibility was to build and direct an active and effective sales force *the world over* for the sale of Agri Funds shares. The Complaint alleged that Meily fully performed his obligations under the contract.

The contract provided that either party could terminate it for "just cause," as defined therein, prior to April 30, 1973.

On or about January 10, 1971, the Respondent attempted to terminate the agreement. The Complaint alleged that this attempt was invalid for various reasons.

The attempted termination was accomplished via a telegram addressed to Meily, and delivered to him in London, wherein he was instructed to "*direct any communication in reference to this termination to the attention of Mr. Edward Walterman, 999 So. Bayshore Drive, Suite 501, Miami, Florida, U.S.A.*" [Emphasis added] The telegram also stated that Mr. Walterman would respond ". . . in his appointed capacity as general counsel representing Agricultural Investment, S.A. and First National Investment, S.A. or their affiliates and associates . . ."

On January 12, 1971, Meily, in compliance with the terms of the contract, terminated the contract for "just cause." The letter of termination, a copy of which was attached to the Complaint, was sent by registered mail to *Walterman* at the *Miami* address referred to in AICSA's telegram.

On June 14, 1971, Meily filed a Complaint in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida (Case No. 71-11509), wherein he sought to recover damages in excess of $120,000.00 and other relief as a result of the Respondent's breach of his employment contract.

Jurisdiction over AICSA was obtained through service on Mr. Edward Walterman, officer and general counsel of

the corporation and over the other Respondents by service on Alfred Landin, another Miami resident.

The Respondents responded by filing a Motion to Dismiss grounded, *inter alia*, on the doctrine of forum non conveniens. In support of their motion they filed an Affidavit executed by Edward Walterman, wherein he asserted essentially as follows (*as of the date the Affidavit was executed*): that AICSA had no office of any kind in Florida, had no agent or employees or representatives in the State of Florida, did not maintain a telephone, mailbox or mailing address in the State of Florida, and did not conduct any form of business in the State of Florida. In addition, Walterman asserted that the primary witnesses (in this case) are located either in London or other foreign countries or other States of the United States and that all of the pertinent events and transactions occurred outside Florida, with most of them occurring in either Germany or England.

Meily countered by presenting the Court with evidence and Affidavits which contradicted the assertions made in Walterman's Affidavit and established that during the duration of the employment contract, up to, including and following the termination of same, AICSA had its official and principal place of business located in Miami, Florida, at the Four Ambassadors Hotel.

On the question of the location of witnesses, Walterman and Landin, two of the four principal witnesses, undoubtedly reside in Miami, as they were served there. Marcus appears to have a residence in Miami. The last witness is Meily, who chose the forum.

The Respondent produced no affidavits or evidence which contradicted the foregoing facts except to the extent that the Walterman and Landin Affidavits may offer contradiction.

It is clear from the Record that the only place in the United States where Meily could obtain jurisdiction over the Appellees is in Miami, Florida.

In the face of this, the lower court nevertheless dismissed the Complaint, basing its action on the forum non conveniens doctrine. After the denial of his motion for rehearing and motion to vacate, Meily perfected an interlocutory appeal to the Florida District Court of Appeal, Third District (Case No. 71-1046), where the trial court's dismissal was affirmed, *Per Curiam*, with no opinion.

The Federal questions which Petitioner seeks to have reviewed were first raised in the District Court of Appeal.[1] Points IV and V of the Appellant's brief[2] filed in that Court argued the following issues:

> "POINT IV: THE LOWER COURT'S ORDER OF DISMISSAL SHOULD BE REVERSED BECAUSE APPELLEE FAILED TO SUSTAIN ITS BURDEN OF PROVING THAT THE SELECTED FORUM WAS MANIFESTLY INAPPROPRIATE UNDER THE APPLICABLE RULE OF LAW."

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[1]Under Rule 3.5, Florida Appellate Rules, assignments of error are only for the purpose of designating "identified judicial acts . . . , grounds for error need not be stated in the assignment." The grounds for error are initially stated in the Appellant's brief.

[2]Petitioner has requested the Clerk of the Florida District Court of Appeal to include that brief in the Record which will be furnished this Court in conjunction with the filing of this Petition.

"POINT V: THE LOWER COURT'S ORDER OF DISMISSAL SHOULD BE REVERSED BECAUSE A UNITED STATES COURT MAY NOT DISMISS A SUIT BROUGHT BY A U.S. CITIZEN WHEN IT HAS JURISDICTION OVER THE DEFENDANT IF SUCH DISMISSAL WILL LEAVE THE PLAINTIFF WITH RECOURSE ONLY TO FOREIGN (NON-U.S.) COURTS AND WILL VIOLATE HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS."

Under Point V Petitioner argued that the trial court's dismissal violated his rights as protected by Article 4, §2 of the United States Constitution (privileges and immunities clause) and under Amendment 14, §1 of the United States Constitution (privileges and immunities clause and due process clause), in addition to comparable provisions contained in the Florida Constitution.

Although the District Court of Appeal did not *expressly* pass on the constitutional issues (inasmuch as there was no written opinion), it could not have affirmed the decision of the trial court without resolving the constitutional issues against the Petitioner. *Meily v. Agricultural Investment Corporation, S.A.*, 258 So.2d 519 (Fla. App. 3d 1972). Meily's Petition for Rehearing was denied.

On April 16, 1972, Petitioner filed a Notice of Appeal to the Florida Supreme Court.

Also on April 16, 1972, Petitioner filed a Petition for Writ of Certiorari in the Florida Supreme Court.

On October 13, 1972, the Florida Supreme Court entered an Order granting a motion to dismiss the appeal for lack of jurisdiction.[3] ____ So.2d ____.

On November 14, 1972, the Supreme Court entered an Order Allowing Certiorari in which it tentatively accepted jurisdiction. In his brief on the merits filed pursuant to the Order Granting Certiorari, Meily argued, *inter alia*, the following points:

> "POINT III: THE DISMISSAL OF A COMPLAINT FILED BY A U.S. CITIZEN AGAINST FOREIGN (NON-U.S.) CORPORATIONS, BASED ON THE THEORY OF FORUM NON CONVENIENS, WHICH HAS THE EFFECT OF RELEGATING THE PLAINTIFF TO COURTS OF FOREIGN COUNTRIES, CONSTITUTES A VIOLATION OF RIGHTS SECURED THE PLAINTIFF BY THE PRIVILEGES AND IMMUNITIES CLAUSE OF U.S.C.A. CONST., AMEND. 14, A DENIAL OF DUE PROCESS OF LAW UNDER U.S.C.A. CONST., AMEND. 14 AND FLA. CONST. ART. I, §9 AND A DENIAL OF THE CITIZEN'S RIGHT TO ACCESS TO THIS STATE'S COURTS AS SECURED BY FLA. CONST. ART. I, §§ 9 AND 21."

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[3]Article V, §4 of the Florida Constitution gives the Florida Supreme Court *appellate* jurisdiction over decisions of District Courts of Appeal which, *inter alia*, initially construe a controlling provision of the State or Federal Constitution. This section has been applied in such a manner that a Per Curiam decision of a District Court, without a written opinion will not activate the Supreme Court's *appellate* jurisdiction. See, e.g., *Ogle v. Pepin*, 273 So.2d 391 (Fla. 1973).

"POINT III-A: THE DISMISSAL OF PLAINTIFF'S COMPLAINT BASED ON THE DOCTRINE OF FORUM NON CONVENIENS CONSTITUTES A DENIAL OF HIS RIGHTS UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION."

"POINT III-B: THE DISMISSAL OF A COMPLAINT FILED BY A U.S. CITIZEN BASED ON THE DOCTRINE OF FORUM NON CONVENIENS, WHERE THE DISMISSAL WILL RELEGATE THE PLAINTIFF TO FOREIGN COURTS, CONSTITUTES A DENIAL OF THE PLAINTIFF'S RIGHT TO ACCESS TO U.S. COURTS AS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, U.S.C.A. CONSTITUTION AND FLA. CONST. ART. I, §§ 9 AND 21."

After hearing oral argument the Florida Supreme Court, on March 28, 1973, entered a Per Curiam decision in which it concluded that it did not have jurisdiction because there was no jurisdictional conflict of decisions present.[4] The Writ was therefore discharged.

Although the majority decision of the Florida Supreme Court did little more than state there was no jurisdiction, Justice Ervin of that Court, in a written opinion dissented

[4]Article V, Section 4 of the Florida Constitution gives the state Supreme Court certiorari jurisdiction over District Court any decision which ". . . is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law . . ."

from the majority view on the jurisdictional issue and went on to express his views on the merits of the appeal. One part of his statement offers a compelling argument for this Court to issue a writ of certiorari:

> "We should be loath to deny our nationals access to the nation's state or federal courts under the circumstances appearing here. Clear abuse appears here in denying an American citizen access to our state courts reaching constitutional proportions and creating conflict in decisions. Long-arm statutes and other modern statutes analogously point the way to concluding American citizens should not be denied the right to litigate claims in appropriate American courts where the parties sued have established venue status by having offices or transacting business within their jurisdiction. The result here is a relic of bygone day."

On April 11, 1973, Meily filed a Petition for Rehearing, which was denied by an Order entered on May 7, 1973.

REASONS FOR GRANTING THE WRIT

1. This case presents squarely the issue of the scope of the right of a United States citizen to access to his own country's courts under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. More specifically, this case presents the issue of whether any United States Court may, consistent with Due Process, dismiss a complaint filed by a U.S. citizen, under the doctrine of forum non conveniens, when to do so will relegate that citizen to the courts of a foreign country.

2. The issue is a timely one which assumes particular significance in view of the continuously increasing international mobility of citizens of this country and the increasing social, economic and commercial interaction between citizens of this country and citizens of foreign countries in the international area. As a consequence of this interaction the issue has arisen with increasing frequency as time goes on. See, e.g., cases cited in *Anno* (Forum Non Conveniens) 10 A.L.R. Fed 352 §8[b] ("American nationality of party") and §17 ("Actions by American citizens or corporations against aliens or foreign corporations").

3. This Court has held that Due Process encompasses a right of access to the courts. *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed.2d 113 (1971). This Court carefully refrained from holding that access for all individuals to the courts is a right that is guaranteed under all circumstances by the Due Process Clause of the Fourteenth Amendment. 401 U.S. at p. 382. However, it demonstrated that the right is a viable one. The Court below rejected Petitioner's argument that the Due Process right to access protects a U.S. citizen from being dismissed under facts such as those presented in the instant case.

4. This Court has expressly recognized that the application of the forum non conveniens doctrine to suits brought by American citizens against foreign defendants brings ". . . into force considerations very different from those in suits between foreigners." *Swift & Co. Packers v. Compania Colombiana*, 399 U.S. 684, 94 L.Ed. 1206, 1215 (1950). Of special significance in that case was a question which this Court posed, in the context of forum non conveniens, and left unanswered:

> "We need not now decide the abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens." 94 L.Ed. at p. 1215.

The foregoing is a recognition that U.S. citizens occupy a special status in the courts by virtue of that citizenship. Petitioner respectfully submits that this special status is more than mere status; it is in fact a constitutionally protected right of access to this country's courts. The instant case directly presents the question of whether or not the Due Process Clause does indeed protect Petitioner against being forced out of U.S. courts.

5. Several Federal Courts have implied that there does exist an absolute right in a U.S. citizen, suing in his own right, to remain in the courts of his own country under the circumstances of the instant case. Thus, in *U.S. Merchants & Shippers' Ins. Co. v. A/A Den Norske A. OGA, Line*, 65 F.2d 392 (2nd Cir. 1933), Judge Learned Hand made the following statement:

> "But the libellant is a citizen and asserts its absolute privilege of resort to its own courts, independently of any inconvenience to the respondent. How far such inconvenience can be recognized, depends upon the local procedure which at times does indeed protect a non-resident from local suit. Courts are maintained to give redress primarily to their own citizens; it is enough if these conform to the conditions set upon their jurisdiction. All this is entirely true, and would be conclusive, if the libellant sues in its own right. The question is whether it is equally true, when it sues as subrogate."

The foregoing excerpt assumes the existence, in a U.S. citizen, of an absolute right of access to his country's courts. Such an interpretation has been placed on the case by at least one Court. *Stewart v. Godoy-Sayan*, 153 F.Supp. 544 (D.C. N.Y. 1957). Petitioner submits that this right has a constitutional basis and that that basis is the Due Process Clause.

The Fifth Circuit has also posed the question and left it unanswered:

> ". . . we have found no cases in which a resident citizen suing in his own right was dispatched to a foreign court. It strikes us as being inconsistent with the very purpose and function of the federal courts to hold that one may decline to hear a case and thereby in effect decree that a citizen must go to a foreign country to seek redress of an alleged wrong. Nevertheless, because we are of the belief that it is unnecessary to do so here, we are not prepared in *any* such case to decline jurisdiction. Experience has taught that such a holding may prove unsound in extreme cases; and the Supreme Court in the *Swift* case, *supra*, declined to pass upon a similar point. We leave that question open." *Burt v. Isthmus Dev. Co.*, 218 F.2d 353 (5th Cir. 1955), cert. den. 349 U.S. 922, 99 L.Ed. 1254 (1955).

The issue which the instant case presents for determination is precisely the issue which this Court and the Fifth Circuit have intentionally left unanswered because the decision could be reached on other, non-constitutional grounds. Petitioner's case does not offer other grounds for decision; the question is squarely presented as a matter of Due Process.

6. There are numerous cases from the Federal courts, other than the Supreme Court, and state courts which recognize that significantly different considerations come into play under facts such as exist in the instant case. The rule which has generally been applied where application of the forum non conveniens doctrine will relegate a U.S. citizen to the courts of foreign countries is *manifest injustice*, rather than mere inconvenience, to the foreign defendant.[5] The decision below stands alone among the reported cases in this country as the first and only case in which a United States citizen suing in his own right has, through application of the doctrine of forum non conveniens, been dismissed from the courts of his own country and thereby been relegated to the courts of foreign countries.

7. Assuming the issue is a constitutional one as Petitioner contends, then the existence of the decision of the Florida courts on the question stands out as a perfect example of the pitfalls inherent in not having a definitive statement on the subject from the highest court in the land. Inconsistent decisions, reflecting agreement or disagreement with the constitutional proportions of the issue, will be inevitable. Although Federal courts have articulated a

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[5]Perhaps the most incisive opinion is that in *Burt v. Isthmus Dev. Co.*, 218 F.2d 353 (5th Cir. 1955):

> "We do, however, express the view that courts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country."

Other cases expressing essentially the same view include: *The Saudades*, 67 F.Supp. 820 (E.D. Penn. 1946); *Latimer v. S/A Industria Reunidas F. Matarazzo*, 91 F.Supp. 469 (S.D. N.Y. 1950); *Lesser v. Chevalier*, 138 F.Supp. 330 (S.D. N.Y. 1956); *Hertz System, Inc. v. McIlloree*, 168 N.E.2d 468 (Ill. App. 1960); *Hoffman v. Governman*, 420 F.2d 423 (3rd Cir. 1969); *Kolber v. Holyoke Shares, Inc.*, 213 A.2d 444 (Del. 1965); *Bagarozy v. Meneghina*, 131 N.E.2d 792 (Ill. App. 1955); cf., *In Re Unterweser Reederei, GMBH*, 428 F.2d 888 (5th Cir. 1970).

rule of "manifest injustice" in situations such as ours,[6] they have in fact administered a rule of prohibition—against forcing U.S. citizens to the courts of foreign countries. So long as that rule prevails the states will be free to accept or reject the proposition—since it is merely a matter of policy—with obvious, inevitable and adverse consequences, in the forum of conflicting decisions.

8. Petitioner is a citizen of the United States and consequently assumes burdens (taxes) and responsibilities (voting) which attach to that station. The fact that he may live outside the boundaries of this country does not eliminate these obligations. As a citizen Petitioner should be entitled to enjoy the most basic rights, or benefits, which attach to citizenship under the Constitution. He would certainly be entitled to all the due process rights in a criminal proceeding. Surely he should be entitled to the other protections afforded by Due Process—including access to courts. A citizen's right to access to the courts of his own country has been recognized to exist by the courts—both State and Federal. This right, in other contexts, such as that presented in *Boddie v. Connecticut*, has been deemed to be a matter of Due Process. Although the citizen's right to access to the courts, as presented in cases reflecting our facts, has not been explicitly described as being a due process matter, that is the only logical source of such a right. Surely it is not solely a matter of "public policy" without reference to the basic document which establishes the parameters of such policy. The question is indeed a constitutional one and the instant case provides this court with an opportunity to define the nature and scope of a citizen's right to access.

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[6]See, e.g. *Burt v. Isthmus Dev. Co.*, 218 F.2d 353 (5th Cir. 1955).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ William E. Sadowski of
HELLIWELL, MELROSE
& DeWOLF
Attorneys for Petitioner
600 Brickell Avenue
Miami, Florida 33131

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, to Frates, Floyd, Pearson, Stewart, Proenza & Richman, Attorneys for Respondents, 12th Floor, Concord Building, Miami, Florida, this 3rd day of August, 1973.

/s/ William E. Sadowski

Attorney

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
NO. 71-11509
JOHN JAMES MEILY, JR.,

Plaintiff,

vs.

AGRICULTURAL INVESTMENT
CORPORATION, S.A., et al.,

Defendants.

ORDER

THIS CAUSE came on to be heard upon the Motions of the Defendants, AGRICULTURAL INVESTMENT CORPORATION, S.A. and AGRI INTERNATIONAL, S.A., to Dismiss this cause on a theory of forum non-convenience in that Florida is not the proper or convenient forum for the trial of this cause and the Court having heard argument of counsel and being fully advised in the premises, it is

ORDERED AND ADJUDGED that the Motions of the Defendants, AGRICULTURAL INVESTMENT CORPORATION, S.A. and AGRI INTERNATIONAL, S.A., be and the same is hereby granted.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 4 day of August, 1971.

J. GWYNN PARKER

CIRCUIT COURT JUDGE

APPENDIX B

[TITLE OMITTED]

ORDER

THIS CAUSE came on to be heard upon the Motion of the Plaintiff, JOHN JAMES MEILY, JR., for a rehearing as to this Court's Order of Dismissal of this case based on a theory of forum non conveniens, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED and ADJUDGED that the Plaintiff's Motion be and the same is hereby denied and the prior Order of Dismissal be and the same is hereby reaffirmed.

DONE AND ORDERED at Miami, Dade County, Florida, this 19 day of August, 1971.

J. GWYNN PARKER

CIRCUIT JUDGE

APPENDIX C

[TITLE OMITTED]

ORDER

THIS CAUSE coming on to be heard of the Plaintiff's Motion to Vacate Order of Dismissal pursuant to Rule 1.540(b), Fla. R. Civ. P., and the Court having heard argument of counsel and having considered all the evidence and Affidavits filed in conjunction with Plaintiff's Motion to Vacate and the evidence and Affidavits heretofore submitted by the parties in conjunction with earlier motions directed to the question of forum non conveniens, and being otherwise fully advised of the premises, it is

ORDERED AND ADJUDGED that Plaintiff's Motion to Vacate this Courts' prior Order dismissing this case on the theory of forum non conveniens be and the same is hereby denied.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 9 day of September, 1971.

J. GWYNN PARKER

CIRCUIT JUDGE

APPENDIX D

[TITLE OMITTED]

Opinion filed January 25, 1972.

An Interlocutory Appeal from the Circuit Court for Dade County, J. Gwynn Parker, Judge.

Helliwell, Melrose & DeWolf and William E. Sadowski, for appellant.

Frates, Floyd, Pearson & Stewart and Alan J. Greer, for appellees.

Before SWANN, C.J., and CHARLES CARROLL and HENDRY, JJ.

PER CURIAM.
Affirmed.

APPENDIX E

[TITLE OMITTED]

Respondents' Motion to Dismiss Appeal is granted and it is ordered that the appeal be and the same is hereby dismissed.

ROBERTS, C.J., CARLTON, ADKINS and DEKLE, JJ., Concur
ERVIN and BOYD, JJ., Dissent

cc: Hon. Wm. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
Messrs. Helliwell, Melrose & DeWolf
Messrs. Frates, Floyd, Pearson & Stewart

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

/s/ Dave Lang, Jr.
Chief Deputy Clerk
Supreme Court of Florida

APPENDIX F

Opinion filed March 28, 1973

Writ of Certiorari to the District Court of Appeal, Third District

William E. Sadowski of Helliwell, Melrose & DeWolf, for Petitioner

Ray H. Pearson, Alan G. Greer and Bertha Claire Lee of Frates, Floyd, Pearson & Stewart, for Respondents

PER CURIAM.

By petition for writ of certiorari, we are requested to review a decision of the District Court of Appeal, Third District, which allegedly conflicts with a prior decision of the District Court of Appeal, First District.

Our initial examination of the petition and record suggested a possible jurisdictional conflict. We issued the writ and have heard arguments on both jurisdiction and the merits.

After a thorough consideration of the petition, record, briefs and argument, we are now led to conclude that no jurisdictional conflict of decisions is present. Finding, therefore, that the writ was improvidently issued, it is hereby discharged.

It is so ordered.

CARLTON, C.J., ROBERTS, McCAIN and DEKLE, JJ., Concur

ERVIN, J., Dissent with Opinion
ERVIN, J., dissenting:

Petitioner, John J. Meily, Jr., a United States citizen, entered into an employment contract with respondents Agricultural Investment Corporation, S.A. (hereinafter "AICSA"), a Panamanian corporation, and First National Investment Corporation, S.A. (hereinafter "FNICSA"), a Luxembourg company. Respondent Agri International, S.A., is incorporated under the laws of Panama and is the successor to FNICSA. Under the terms of the agreement, respondents employed petitioner as a vice-president of FNICSA and as a director of AICSA for a three-year period beginning May 1, 1970. Petitioner's duties included the organizing and directing of a sales force "throughout the world" for this mutual fund organization.

In January 1971 the respondents attempted to terminate this agreement via a telegram to petitioner's London, England, address. He was instructed to "direct any communication in reference to this termination to the attention of Mr. Edward Walterman, 999 So. Bayshore Drive, Suite 501, Miami, Florida, U.S.A., and he will respond in his appointed capacity as general counsel representing [respondents] . . . ." Thereupon petitioner wrote to Walterman regarding his dismissal and on June 14, 1971 filed a complaint in the circuit court for Dade County.

Respondents filed a motion to dismiss the complaint and argued the doctrine of forum non conveniens as one of the grounds for that motion. They submitted affidavits

in support of their position. Petitioner responded by citing the trial court to the Miami address where the petitioner was directed to forward correspondence concerning the termination, and which appeared on the letterhead of AICSA stationery. In addition, affidavits were also submitted by former employees or agents of AICSA which depicted Miami, Florida, as that firm's principal place of business.

In an order dated August 4, 1971, the Circuit Court dismissed the cause on the theory of forum non conveniens. An interlocutory appeal to the Third District Court of Appeal resulted in a per curiam affirmance without opinion. A petition for writ of certiorari was filed with this Court pursuant to the provisions of Article V, Section 4, Florida Constitution, and Rule 4.5c of the Florida Appellate Rules. The record proper reflects the basis for conflict jurisdiction as hereinafter discussed. We should accept jurisdiction because of conflict with the First District Court of Appeal decision in Adams v. Seaboard Coast Line Railroad Company, 224 So.2d 797 (Fla.App. 1969).

In Adams, an action was brought by a resident of Georgia in a Florida circuit court against a Virginia corporation which had its principal place of business in Florida. The cause of action accrued in Georgia. The circuit court dismissed the action on the grounds that the situs of the accident was in Georgia and that all of the witnesses were non-forum residents of that state and not amenable to compulsory process of the court. In a detailed and comprehensive opinion concerning the doctrine of forum non conviens, the District Court of Appeal reversed that decision. In summarizing their discussion, the court stated:

> "In the ultimate, however, it is seen that the application of the doctrine of forum non conveniens is restricted to the limited category of cases in which both parties to the action are non-residents, and the cause of action sued upon arose in a jurisdiction outside of Florida. It is only after these two factors emerge and coalesce that the trial court is authorized to proceed to a determination of whether the criteria necessary to bring into play the doctrine of forum non conveniens have been met. It should be borne in mind that we are not here dealing with a mere procedural mechanic by which an action is transferred from one forum to another without prejudice to either of the parties. We are here dealing with a final judgment dismissing a complaint which has been filed in a proper forum in accordance with the venue statutes of this state, the effect of which might well be to either destroy the cause of action or greatly prejudice the rights of the plaintiff. Under these circumstancies a trial court is required to exercise a much higher standard of discretion in passing upon such a motion to dismiss the action than is otherwise required in the disposition of procedural motions having a less drastic effect upon the substantive rights of the parties." Supra, at 801. (Emphasis supplied.)

The District Court stated that although the defendant had not received its corporate charter from this state, it should be treated as a Florida citizen because it has its principal place of business here.

Although the "record proper," as that term is used in Foley v. Weaver Drug, 177 So.2d 221 (Fla. 1965), consists of little more than a short order dismissal by the circuit court and an affirmance without opinion by the district court, for reasons which I have expressed in Gibson v. Maloney, 231 So.2d 823 (Fla. 1970), I find conflict in the record of this cause with the *Adams* decision. As in the *Adams* case, petitioner here is not a resident of Florida, and while the respondents were not chartered in this state, they have a principal office and have carried on extensive business activities here, as evidenced by Miami letterheads on their stationery and the addresses there of members of the boards of directors and petitioner was expressly directed by respondents to correspond with their Miami attorney regarding his dismissal. While I realize that application of the doctrine of forum non conveniens is within the judicial discretion of the trial court, it should not be employed unless the inconvenience and expense placed upon a defendant "clearly and substantially outweighs the privilege of a plaintiff to choose the forum in which the suit is filed." 8 Fla. Jur. Supp. Courts § 57. This does not appear to be a case where another forum would better serve the convenience of the parties and the ends of justice. See Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), holding American citizens should not be denied the use of Florida courts in suing corporate entities whose interests, although diffused throughout the world, are nevertheless firmly entrenched within our borders.

We should be loath to deny our nationals access to the nation's state or federal courts under the circumstances appearing here. Clear abuse appears here in denying an American citizen access to our state courts reaching con-

stitutional proportions and creating conflict in decisions. Long-arm statutes and other modern statutes analogously point the way to concluding American citizens should not be denied the right to litigate claims in appropriate American courts where the parties sued have established venue status by having offices or transacting business within their jurisdictions. The result here is a relic of a bygone day.

The decision of the District Court of Appeal should be quashed and the cause remanded to the trial court so that the petitioner may have his day in court and the merits of his suit decided.

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in the Supreme Court of the United States

_____ TERM, 1973

NO. 73-251

JOHN JAMES MEILY, JR.,
Petitioner,

vs.

AGRICULTURAL INVESTMENT CORPORATION, S.A., a Panamanian company, and FIRST NATIONAL INVESTMENT CORPORATION, S.A., a Luxembourg company, and AGRI INTERNATIONAL, S.A., a Panamanian company,
Respondents,

On Petition For Writ of Certiorari To the District Court of Appeal of Florida, Third District

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

PREFACE

The following symbols will be used:

R	for	Record
P	for	Petition for Certiorari
PA	for	Petitioner's Appendix

All emphasis will be ours unless otherwise indicated.

JURISDICTION

It is respectfully contended by Respondents that Petitioner erroneously seeks to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257(3) inasmuch as no title, right, privilege or immunity of the Petitioner has been denied, abridged or drawn in question. As will be demonstrated *infra,* Petitioner has by express contract, as well as by his calculated conduct, waived all rights and privileges of access to American Courts where more convenient forums exist.

QUESTION PRESENTED

WHETHER DISMISSAL OF THE COMPLAINT BY A FLORIDA COURT FOR FORUM NON CONVENIENS VIOLATES THE PRIVILEGES, IMMUNITIES OR DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHERE 1) PLAINTIFF, A UNITED STATES CITIZEN, RESIDING IN ENGLAND; 2) ENTERED INTO AN EMPLOYMENT CONTRACT IN WEST GERMANY WITH 3) A PANAMANIAN CORPORATION AND A LUXEMBOURG COMPANY; 4) TO BE PERFORMED IN ENGLAND AND 5) INTERPRETED IN ACCORDANCE WITH PANAMANIAN LAW AND 6) PROVIDED FOR SUBMISSION OF ALL DISPUTES TO ENGLISH ARBITRATION?

STATEMENT

It is to be noted that Petitioner does not support his "Statement" with a single Record reference (P4-11), as required by Supreme Court Rule 23(f). Said statement is seriously misleading for the following reasons:

1. Nowhere does Petitioner state that at the time of the dismissal of the complaint on 4 August 1971, the only affidavit in opposition to the two affidavits relied on by Respondents was the affidavit of Petitioner's attorney attaching the Articles of Incorporation of AGRI and an amendment thereto. (R117-127) Thereafter on 27 August 1971 Petitioner filed his Motion to Vacate Order of Dismissal (R62) attaching thereto the affidavits of three foreign employees of respondents, all executed in London, England. (R64-70) Respondents' counsel also filed his second affidavit attaching certain other documentary evidence including a post card, two articles of the London Daily Express, an original brochure entitled "Agri Fund" and two certificates of the Assistant Registrar of Companies in London, England. (R71-72) The court refused to vacate its order based on the "newly discovered evidence." (R55)

2. Significant facts are omitted, to-wit:

a) Petitioner was a resident of Munich, West Germany, at the time of the contract herein (R173) and is currently a resident of London, England.

b) Said contract was entered into in West Germany and was to be performed in London, England. (R173)

c) None of the provisions of said contract contemplated the performance of any act in the United States. (R169-173)

d) In addition said contract contained the following provisions involving foreign countries:

I a) AICSA shall deposit in a special escrow account with the Union Banque Suisse (UBS), Zurich, Switzerland, the sum of 100,000 (One Hundred Thousand) dollars, or a Performance Bond for that amount, ... " (R170, 4-a)

II "b) AICSA shall deposit on or before 30 April 1970 in a special escrow account set up for that purpose with the Union Banque Suisse (UBS), Zurich, Switzerland, ... " (R170, 5-b)

III "In the event of pre-mature termination for "Just Cause", and in order to determine whether or not "Just Cause" did, indeed exist, the matter shall be submitted to arbitration in London, England.." (R171, 6-b)

IV "7. *Interpretation of Law:*

a) It is agreed that this contract will be interpreted in accord with Panamanian law.

b) However, it is further agreed that any dispute will be settled in accord with

Para 6-b above and that the offending party will comply with any and all such decisions forthcoming from the Arbitration Committee." (R172)

V "10. *Moving of Household Furnishings:* AICSA agrees to pay all expenses connected with the packing, unpacking, transportation and insurance of Mr. Meily's household furnishings and personal belongings from Munich, West Germany, to London, England." (R173)

VI "11. *Personal Transportation:* AICSA agrees to pay for all transportation costs of Mr. Meily's family, consisting of Mr. Meily, his wife and his son, from Munich, West Germany to London, England." (R173)

e) The telegram terminating Meily's employment emanated from London and was delivered to Meily there. (R148)

f) The two form letters referred to at PB-7 clearly indicate that the business of both AICSA and AGRI was being conducted from offices located at 44 Green Street, London, W.I. England at the time of the alleged breach of contract. (R143-145) Further the letter of February 3, 1971, indicates that all monies comprising accounts receivable were received in England.

"Due to the present Post Office strike in England, it is possible that payments

made by you after January 1, 1971, have not been received or credited to your account. These payments will not, then, be reflected in the net value computation noted above. Please be assured that all payments held up by this strike will be credited to your account in full, with no deduction for interest, and the net value of your Certificate will be adjusted upward accordingly." (R146)

g) AGRI's domicile is the City of Panama and its resident agent is the legal firm of Franco & Franco, 33 A-34 Avenida Cuba, Panama Five, Republic of Panama, Post Office Box 7283. (R134)

h) The directors named in the Articles of Incorporation dated August 10, 1970, include Petitioner Meily and Alfred Landin domiciled at 11A Prince Henri, Luxembourg. (R134)

i) The minutes of AGRI shareholders dated January 25, 1971, held in Miami, Florida, state:

> "The President informed the Shareholders that the object of the meeting is to facilitate the opening of an office of AGRI INTERNATIONAL, S.A. in the Republic of Panama. The purpose of said offices being to provide service and information as necessary to serve clients of Latin America. — To conform with the requirements of Panamanian Law all of the existing officers hereby resign." (R162)

j) The London Daily Express stories of May 6 and July 27, 1971, list the office of AICSA as Green Street in London, in Panama City, Panama, and in Florida. Said newspaper articles also mention that the principal operator of these businesses is Edward Jules Markus, a Canadian citizen who commutes between his Mayfair office penthouse and his Miami hotel suite. (R73)

k) AGRI is listed as a British company and Edward Jules Markus, a director, is listed as a British subject. (R90)

1) The brochure of AICSA contains the following:

A. *"What is Agricultural Investment Corporation S.A.?*
Agricultural Investment Corporation S.A., which founded Agri-Fund and is responsible for the management of Agri-Fund is incorporated in the Republic of Panama as a publically owned corporation having a paid capital of US $10,000,000.00.

* * * *

"The address of the Management Corporation is: Agricultural Investment Corp. S.A., Avenida Cuba 33 A-34, Panama 5, Republic of Panama." (R93)

B. "The net asset value of the fund and per share will be determined by or under the supervision of the Management Company and Fiduciaire Generale de Luxenbourg.

* * * *

"*Sponsor's and Sales Agent's Fees*
First National Investment Corp. S.A. 11 A, Blvd. Prince Henri, Luxenbourg, has been appointed by the Management Company to act as sales agents in the offering of the shares of Agri-Fund." (R107)

C. "*Registration of Shares*
Fiduciaire Generale de Luxenbourg, 13 Blvd. de la Foire, Luxenbourg, shall act as registrar for the shares of Agri-Fund." (R108)

D. "*Custodian and Trustee*
Agricultural Investment Corporation S.A. has appointed Fiduciare Guaranty International S.A., Avenida 5, No. 33 A — 34, Edificio de la Cia. General de Seguros, Apto. 22, Panama 5, Republic de Panama, as a custodian and trustee for the holdings and assets of the investors in Agri-Fund." (R108)

E. "This enables all investors to remit checks or money orders payable to First National Investments Corpora-

tion S.A., and receive immediate credit toward their account. All cheques, bank drafts and money orders should be made payable to First National Investment Corporation A.A. 11 A, Boulevard Prince Henri, Luxenbourg Grand-Duchy of Luxembourg." (R108)

F. *"Auditors*
Auditors for Agricultural Investment Corporation S.A. are Aragon & Asociados, Avenida 5A, No. 33A-34, Panama, whose staff is comprised of the finest accounting experts in Panama." (R108)

G. *"Legal Opinions*
Legal opinions in connection with Agricultural Investment Corp. S.A. and Agri-Fund will be passed upon by FRANCO & FRANCO, Attorneys P.O. Box 7283, Panama 5, Panama. Local offices and agencies of First National Investment Corp. S.A. will employ legal counsel with respect to the laws and legal requirements of each particular locality." (R109)

m) With the exception of two affidavits filed by Meily's Florida counsel, all affidavits filed by Petitioner have been executed in London, England or West Germany. (R64,67,69)

n) The affidavit of Henry Wallace Chmielewsky executed in England is based entirely on hearsay, utilizing such language as "based on what Edward Jules Markus told me ... "; "I was informed by ... "; "I was always given to understand .. "; "I was always given to believe ... "; "I was always under the impression ... "; "In my opinion ... "; and etc. Such evidence is incompetent and immaterial. (R64-66)

o) The affidavit of Samir Y Khatib, a citizen of Jordan residing in London, is similarly incompetent and irrelevant, containing largely hearsay testimony such as "I was told ... "; "I was also told ... "; "I was given to understand ... "; and etc. (R67-68)

p) The affidavit of Dr. Helmuth Jahns, a citizen of West Germany, merely stated that in November of 1970, to the best of his knowledge AICSA had offices in Miami, but that as of August 1971 he did not know if AICSA was "presently maintaining offices in Miami, Florida." (R69-70)

q) Petitioner never obtained service on First National Investment Corporation, S.A., a Luxembourg corporation, a named defendant, who is one of the parties to the contract.

REASONS FOR NOT GRANTING THE WRIT

1. In pressing this Court to accept jurisdiction on the basis that as a United States citizen residing outside the United States, he has been denied access to the courts of Florida, Petitioner unfairly ignores his own conduct in assiduously and expressly avoiding all contact with the United States in order to carry on an "off shore" mutual fund enterprise. It is too well established to require citation that a person may waive any right, immunity or privilege granted to him by his government by his own conduct. When Petitioner, himself an integral part of the foreign corporations he now seeks to sue in Florida, contracted to avoid all contact with the United States, he obviously waived any absolute right to sue in any American Court he deemed appropriate. *Cuba R. Co. v. Crosby*, 222 U.S. 473, 480; 32 S. Ct. 132,133, 56 L.Ed. 274. International mobility is one thing (P12), waiver of privileges and immunities quite another. The contract itself could have assured the parties' right to seek redress in American courts, but such a provision would have defeated the parties' intention to avoid all United States contacts.

2. Moreover, the federal courts have quite clearly closed their doors to American citizens with foreign domiciles in many instances. Florida should not be held to a different standard under the facts of this case where Petitioner has access to many other forums. It is universally held that plaintiff may be a citizen of the United States, yet if he is not domiciled in any state he may not sue in a federal court under diversity of citizenship because he would not be a resident of any

state, E.g., in *Clapp v. Stearns & Co.* (E.D.N.Y. 1964) 229 F.Supp. 305 the court stated:

> ... "An averment of residence is not the equivalent of an averment of citizenship for the purposes of jurisdiction in the courts of the United States". Everhart v. Huntsville Female College, 120 U.S. 223,224, 7 S.Ct. 555, 3 L.Ed. 623 (1887). For all that appears, plaintiff may be a citizen of the United States with a domicile in Nassau. If so he may not sue in a Federal Court under diversity of citizenship jurisdiction because he would not be a citizen of any state. Pemberton v. Colonna, 290 F.2d 220 (3rd Cir. 1961); McClanahan v. Galloway, 127 F.Supp. 929 (N.D.Cal. 1955): Alla v. Kornfieldl, 84 F.Supp. 823 (N.D.Ill. 1949); Cowell v. Ducas, 2 F.Supp. 1 (S.D.N.Y. 1932); Hammerstein v. Lyne, 200 F. 165 (W.D. Mo. 1912); 1 Barron and Holtzoff, Federal Practice & Procedure 138 (Wright ed. 1960). The second and third counts in the complaint must be dismissed for lack of jurisdiction.

3. Jurisdiction of this Court is not justified herein. Petitioner did not properly raise or perserve the constitutional issues herein.

4. None of the cases cited by Petitioner are even remotely analagous to the facts now before this Court: E.g. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (P12) deals with right of female welfare recipients to bring divorce suits where they are unable to pay court fees and costs; *Swift & Co. Packers v. Compania Colombiana*, 339 U.S. 684-698, concerns the right of an

American Company to a foreign attachment of a vessel pursuant to a libel in personam.

ARGUMENT

The well-settled law of Florida is stated in *Adams v. Seaboard Coast Line Railroad Company,* (Fla. App. 1st 1969) 224 So. 2d 797, 800:

> "...(I)f a transitory action is filed in a court of Florida between nonresident parties seeking to litigate a cause of action accruing in a foreign jurisdiction, the trial court is accorded a sound discretion in determining whether it should retain jurisdiction of the action, or dismiss it without prejudice to the right of the plaintiff to reinstitute the action in a more appropriate and convenient forum."

Petitioner's encyclopedic treatment of the law cannot alter the facts of his case. He voluntarily entered into a contract which provided a more appropriate and convenient forum to litigate in. (R171)

A. *At least two other appropriate forums are available to Petitioner.*

Meily's own evidence reveals that there are at least two other more appropriate forums available to him. Significantly the affidavits relied on by Petitioner were all executed in England. The most obvious choice is England where both Meily and one of Respondents' main officers, Edward Jules Markus, reside and where both corporations are engaged in business. The second obvious forum is Panama, where both Respondents

were incorporated and are domiciled (R92,134) and where there is a resident agent to accept service. (R120,135) None of the affidavits of Respondents' foreign employees nor Petitioner's attorney contradict these significant factors. (R64,70) Nowhere does Petitioner state that Florida is the only forum to which he has access. (R162,168)

Moreover, while Petitioner may be an American citizen (albeit never a Florida resident) his own evidence reveals that he has chosen not to reside in the United States for many years. (R169) The contract upon which Meily brings suit deliberately avoided all responsibility for compliance with Florida law[1], American law, or liability for Florida or United States taxes. (R169,173) It is to be assumed that Mr. Meily, a sophisticated businessman, who has always been either a director, an incorporator, or both of all Respondent corporations (R100,130,134) entered into his foreign contract with full knowledge and awareness that his judicial recourse would correctly be limited to foreign courts.

Indeed, bringing suit in Florida under these facts can be nothing more than astute forum shopping.

The trial court correctly exercised its discretion in dismissing the cause herein on the basis of forum non conveniens. *Southern Railway Company v. McCubbins,* (Fla. App. 1967) 196 So. 2d 512; *Faulkner v. S.A. Empresa de Viaco Airea Rio Grand,* (Fla. App. 3rd 1969) 222 So. 2d 805.

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[1]Obviously, these corporations do not wish to be required to comply with the provisions of the Florida or United States laws governing the regulation of the sale of securities.

B. *AICSA is not a Florida resident.*

For purposes of this brief, Respondents assume *arguendo* that AICSA is doing business in Florida and was properly amenable to service of process. But that is not the test determining the applicability of the forum non conveniens doctrine. It is apodictic that "The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even if jurisdiction is authorized by the letter of the general venue statue." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507.

Thus, a corporation may be doing business in Florida and may be subject to the jurisdiction of the Florida courts without being a Florida resident. *Southern Railway Company v. McCubbins, supra.* At the hearing, Respondents relied on the affidavit of AICSA's director, Edward Walterman who unequivocally stated that AICSA was a Panamanian corporation with primary offices in London, England, and that the corporation does not presently have an office, a telephone, mailing address or any agents or employees within the State of Florida (R150)

Those statements were not contradicted by any substantial competent evidence. The trial court obviously was unimpressed by the vague, equivocal, hearsay statement contained in the affidavits of AICSA's foreign employees, executed in London, and filed as "newly discovered evidence" (R54) after the court's dismissal of the complaint. Moreover, all of the Petitioner's own documentary evidence negates his argument that AICSA is a Florida resident, e.g., the brochures, (R91 et seq.) letters (R143,145) and newspaper clippings.

Before the Florida Supreme Court, Petitioner relied on *Adams v. Seaboard Coast Line Railroad Company, supra,* to establish conflict jurisdiction. But *Adams* was so dissimilar factually that it was inapposite and after tentatively accepting jurisdiction the Florida Supreme Court found no conflict and discharged the writ. (PA F) In *Adams,* a Georgia resident sued a railroad company, a Virginia corporation, whose official headquarters and principal place of business was Florida, during the entire time of suit. That case involved an FELA action accruing at Waycross, Georgia. The trial court's dismissal for forum non conveniens was reversed on the basis that the defendant could not complain about being sued at the place of its official residence which residence was only 75 miles from the site of the accident involved. (224 So. 2d 801) The situs for the contract in dispute herein is not in an adjacent state, but in a foreign nation, thousands of miles away. In the present case Petitioner is an English resident, suing on his contract with two Panamanian corporations. That contract was executed and performed in England, and none of the foreign corporations now maintain any Florida offices or employ any agents in Florida.

AICSA is not a Florida resident.

C. *AICSA, a Panamian Corporation, did not waive its right to dismissal of a complaint for forum non conveniens under the facts herein.*

Petitioner bottoms all of its arguments on a statement completely unsupported by the record — that AICSA's principal place of business is Florida. Neither

Petitioner's argument nor its evidence convinced the trial court that the proper forum for this suit between non-residents based upon a contract and facts totally unrelated to Florida activities was Florida.

D. *There was competent, substantial evidence before the trial court to support its exercise of discretion in dismissing the complaint for forum non conveniens.*

Petitioner cannot deny that the *sine qua non* of this appeal is whether in fact the trial court abused its discretion. The criteria set forth, first by the Florida Supreme Court in *Hagen v. Viney,* 124 Fla. 747, 169 So. 391 (1936) and summarized by the court in *Adams, supra,* are:

> "In the exercise of such discretion, the trial court may consider whether the filing of the action constitutes forum shopping on the part of the plaintiff; whether it constitutes undue harassment of the defendant by requiring him to litigate the action in a forum remote from where it accrued or where the defendant resides or maintains a place of business; and, whether the convenience of the parties and witnesses, in the interest of justice, requires the action be litigated in a different forum. In the ultimate, however, it is seen that the application of the doctrine of forum non conveniens is restricted to the limited category of cases in which both parties to the action are non-residents, and the case of action sued upon arose in a jurisdiction outside of Florida." (224 So. 2d 800,801)

The "ultimate" referred to above are all present here — all parties are non-residents of Florida and of the United States for that matter and the cause of action sued upon arose outside of Florida and the United States.

Gulf Oil Corporation v. Gilbert, supra, dramatizes the weaknesses of Petitioner's position and strongly supports Respondents. Gilbert, a Virginia resident, sued Gulf Oil, a Pennsylvania corporation qualified to do business in both Virginia and New York, in a New York federal court for causing a fire and explosion in Gilbert's Virginia warehouse. The trial court dismissed the complaint for forum non conveniens, ruling that Virginia was a more appropriate forum. The Second Circuit Court of Appeals *reversed.* On certiorari, the United States Supreme Court in turn *reversed* the Circuit Court of Appeals, thus reinstating the trial court's dismissal, stating:

> "We are convinced that the District Court did not exceed its powers or the bounds of its discretion in dismissing plaintiff's complaint and remitting him to the courts of his own community. The Circuit Court of Appeals took too restrictive a view of the doctrine as approved by this Court. Its judgment is reversed." (330 U.S. 512)

Gulf Oil specifies the very elements so significant in this case; to wit: "relative ease of access to sources of proof, availability and cost of compulsory process of unwilling witnesses, etc."

Similarly, other cases cited by Petitioners likewise support Respondents' position — either by the express

language therein or the vastly disparate facts. In *The Saudedes*, 67 F. Supp. 820, a Pennsylvania court refused to apply the forum non conveniens doctrine in a suit between two American citizens apparently doing business as a partnership domiciled in Pennsylvania, against two Portuguese shipping companies for a shortage in a tuna fish shipment transported to New York. (P15) No language in that case negates the application of that doctrine under appropriate circumstances such as are now before the court. Here the suit is between non-United States residents in a cause of action accruing entirely outside the United States.

Indeed, Meily is a nonresident American citizen whose contract with two foreign corporations, of which he was an integral part, carefully avoided all necessity for compliance with American law and taxes. Meily was willing to reap the benefits of such an arrangement, but now complains because he may find himself compelled to litigate in the forums of those very countries where he was content to live and work. See *Cuba R. v. Crosby*, 222 U.S. 473.

In *Latimer v. S.A. Industrias Reunidas F. Mattarazzo*, (S.D.N.Y. 1950) 92 Supp. 469, relied on by Petitioner at pages 14, 17, 18, 19, 20, 21, plaintiff was a United States citizen whose foreign employment contract was terminated while plaintiff *was in the United States* and the Brazilian Company was actively engaged in business in the forum at time of suit, facts totally different from those here involved. Significantly the *Latimer* court cited freely from *Gulf Oil, supra.* (P15)

Finally, Petitioner cites *Burt v. Isthmus Development Company*, (5th Cir. 1955) 218 F. 2d 353, an action

brought in a Texas federal court by a New York citizen for recovery of equipment and damages against a corporation domiciled in Texas. Defendant moved to dismiss on ground that the action should be in Mexico because Mexican law was involved. The trial court dismissed for forum non conveniens and the Fifth Circuit reversed, against facts totally dissimilar from the present case. Significantly, the court in *Burt* stressed the American *residency* of the United States citizen and the fact that the corporation was being sued at its domicile. (P14, 15, 16)

Where the facts of this case are present, (i.e.) none of the parties are residents of the State of Florida, the contract involved deliberately avoided any contact with the United States and the Petitioner was an integral part of the foreign Respondent corporations, the case of *De Sairigne v. Gould,* (S.D.N.Y. 1949) 83 F. Supp. 270, is most apposite in its holding and quotation of Mr. Justice Holmes in *Cuba R. Co., supra:*

> "Nor does even an American citizen have an absolute right, under all circumstances, to sue in an American court. U.S. Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line, 2 Cir., 65 F. 2d 392. As Mr. Justice Holmes said in Cuba R. Co. v. Crosby, 22 U.S. 473, 480, 32 S. Ct. 132, 133, 56 L. Ed. 274, 38 L.R.A., N.S., 40:
>
> 'But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the

place that established and would enforce their rights.' "

The trial court correctly exercised its discretion in dismissing the complaint for forum non conveniens. See *Gulf Oil Corp. v. Gilbert, supra.*

E. *No constitutional rights of Petitioner have been abridged by dismissal of his complaint.*

In his constitutional arguments, Petitioner glosses over controlling factors; He is not a Florida citizen nor a Florida resident; he is not presently residing anywhere in the United States. None of the Respondent corporations are Florida residents nor American citizens, the cause of action accrued entirely without the United States, and this suit is in the Florida courts. Clearly, here as in *Gulf Oil Corp., supra,* there is no constitutional issue.

In *Gulf Oil Corp.,* the United States Supreme Court disposed of the agrument that constitutional considerations preclude application of the doctrine of forum non conveniens:

"We later expressly said that a state court 'may in appropriate cases apply the doctrine of forum non conveniens.' Broderick v. Rosner, 294 U.S. 629, 643, 79 L. Ed. 1100, 1107, 55 S. Ct. 589, 100 ALR 1133, Williams v. North Carolina, 317 U.S. 287, 294, note 5, L. Ed. 279, 283, 63 S. Ct. 207, 143 ALR 1273. Even where federal rights binding on state courts under the Constitution are sought to be adjudged, this Court has sustained state courts in a refusal to

> entertain a litigation between a non-resident and a foreign corporation or between two foreign corporations. Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377, 73 L. Ed. 747, 49 S. Ct. 355; Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373, 48 L. Ed. 225, 24 S. Ct. 92." (330 U.S. 504)

Petitioner's injection of constitutional "issues" do not even remotely apply to the facts at hand. In the Petitioner much is made of relegating "that citizen to the courts of a foreign country." (P11, 15) However, it is not the trial court nor the District Court of Appeals nor the Florida Supreme Court who are responsible for the propriety and necessity of Petitioner litigating in a foreign court. Rather, it was the result of carefully calculated steps taken by businessman Meily, as well as a matter of express contract. If under the facts herein, Petitioner had any absolute right of access to the courts of Florida (which we vehemently deny) he expressly waived it by his own conduct.

CONCLUSION

It is respectfully submitted that in the proceedings below, no right, privilege or immunity of the Petitioner has been denied, abridged or drawn in question so as to invoke the jurisdiction of this Court under 28 U.S.C. 1257(3). Inasmuch as Petitioner has not been improperly denied the benefit of the privileges, immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, his Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Brief for the Respondents in Opposition was furnished by mail this 30th day of August, 1973, to: HELLIWELL, MELROSE & DeWOLF, Attorneys for Petitioner, 600 Brickell Avenue, Miami, Florida 33131.

By _____